Nos. 37 and 38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, *Appellant*

v.

TOWNSHIP OF MUSKEGON, a Municipal Corporation, et al.

CONTINENTAL MOTORS CORPORATION, ETC., *Appellant*

v.

TOWNSHIP OF MUSKEGON, a Municipal Corporation, et al.

On Appeals from the Supreme Court of the State of Michigan

BRIEF FOR NATIONAL ASSOCIATION OF COUNTY OFFICIALS, AMICUS CURIAE

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I. INTEREST OF THE NATIONAL ASSOCIATION OF COUNTY OFFICIALS

The National Association of County Officials is a membership corporation organized under the laws of the State of Delaware. It is under the control and management of its active members, numbering about 5,500, all of whom are officials in counties in 43 of the States of the Union.

The Association is a service organization serving county officials in their official capacities. One principal area of such service is that of the exemption from taxation of the large and increasing amount of property under ownership of the Federal Government. This is a matter of major concern to counties and other local governments because of their primary reliance for revenue upon the general property tax.

The seriousness of the impact of Federal tax exemption upon local governments was stated by the Commission on Intergovernmental Relations as follows:

> "One aspect of the tax relations among governments requiring urgent attention is the immunity of the National Government from State and local taxation and the immunity of State and local governments from Federal taxation. In this area the problem of greatest concern to local governments is the tax status of Federal property. The immunity of Federally-owned property from State and local ad valorem taxation has reduced the tax base of many communities which rely on property taxes as their chief source of revenue. The impact of this immunity is uneven; it is particularly severe in areas where the value of Federal property is a large part of total property values.
>
> "This problem has increased in importance with the acceleration of property acquisitions associated with the war and defense efforts and with divers other Federal programs, including urban housing, power production, resources conservation, and regional development and reclamation."
>
> (Report of the Commission on Intergovernmental Relations, June, 1955, pages 107-108)[1]

As of December 31, 1953 the real property, including improvements, owned by the United States consisted of 11,493 installations acquired at a cost of $30,200,000,000. This was exclusive of public domain, national parks and

[1] The Commission was created by Public Law 109, 83d Cong., 1st Sess., 67 Stat. 145-147.

forests, land for other conservation uses; historical sites and trust properties. The total amount of all real property owned by the United States on the above date was 405,100,000 acres which is 21.3% of the total area of continental United States and the equivalent of the area of all the States east of the Mississippi River except Kentucky, Tennessee, Mississippi and Alabama. Of the total value of $30.2 billion of Federally owned property referred to above, 82% is held by the Department of Defense. (Inventory Report on Federal Real Property in the United States as of December 31, 1953, Senate Document No. 32, 84th Cong., 1st. Sess., page 9).

This vast withholding from the reach of the local tax collector, of property taxable except for Federal ownership, imposes a heavy and increasing burden on local governments. In relation to that burden, it will be the purpose of this brief to invite attention to what we believe are pertinent implications of the premise noted in *McCullough* v. *Maryland*, 4 Wheat. 316, 428, that "it is admitted that the power of taxing the people and their property is essential to the very existence of Government". It is this "very existence" of local government which is threatened by the unlimited exercise of the power of the Federal Government to withdraw and withhold property from local taxation. The doctrine of sovereign immunity is being extended by the Federal agencies beyond legitimate bounds. Restriction within such bounds in cases like the present case is urgently needed.

II. ARGUMENT

The doctrine of *McCullough* v. *Maryland*, 4 Wheat., 316, is not applicable to and should not be extended to cover the situation presented in this case. Here the Government has abandoned action in its sovereign capacity in favor of procurement of goods and services through private commercial channels. This conforms to the estab-

lished policy of the Government to transfer to private business, as far as that may reasonably be done, all of the business type activities of the Government. It is the policy of the Department of Defense, however, to invoke the sovereign immunity from taxation to conserve the defense dollar, frequently at the cost, as in the present case, of denying tax collections by local governments, in order to save the funds of the Federal taxpayer. We submit that these two policies are mutually exclusive. In this case the private business concept clearly excludes resort by the Government to the concept of sovereign immunity.

A. The policy of the Federal Government to acquire its needed goods and services through private commercial channels, so far as is reasonably possible, has been stated as follows:

> "2. *Policy*: It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels. Exceptions to this policy shall be made by the head of an agency only where it is clearly demonstrated in each case that it is not in the public interest to procure such product or service from private enterprise."
>
> (Bulletin No. 55-4 of the Executive Office of the President, Bureau of the Budget, June 15, 1955)

B. While purporting to adhere to the foregoing principle in theory, the Department of Defense has nevertheless been unwilling to relinquish the inconsistent advantage of sovereign immunity from taxation. The Department's position was officially stated by Mr. Wilbur M. Brucker, General Counsel, Department of Defense, as set forth below. At the time of the statement quoted Mr. Brucker was testifying before a Senate Subcommittee in opposition to two bills (S. 2473 and H.R. 5605, 83d Cong.)

calling for payments to local governments in lieu of taxes on Federally owned property. He stated: "I would like to give a statement to the Subcommittee as to the reasons for opposition and then, if I could, I would like to file some papers with the Subcommittee for their consideration.

"The first reason for opposition is based on the principle of the sovereign's immunity from taxation.

"The second reason is based on the serious dissipation of the defense dollar."

At this point in the testimony reference was made to statistical illustrations drawn from cases pending in court to show the cost to the Defense Department if the bills under consideration were enacted. Various percentages of the value of the property of the Department were indicated as possible bases for computing the tax under the bills. The witness then concluded as follows:

"When we have pointed out these three illustrations that average well over 3 percent, we think that the 2 percent is a safe bet to give to this Subcommittee so that you can have the best information we can furnish you as to what you may look forward to with respect to the total bill to the Government.

"They may or may not make any difference. The Congress may decide it is willing to spend $220 million, or $120 million, or $320 million, but we think you should have our estimate first in connection with the second argument here of the impact upon the appropriations for the Defense Department." (Hearings before Subcommittee on Legislative Program of the Committee on Government Operations, U.S. Senate, June 3, 1954 on S. 2473 and H.R. 5605).

C. In the present case the Department of Defense undertook procurement through regular commercial channels. The production and delivery of the goods and serv-

ices procured was not a government function at all but solely a function of private business selling goods and services to the Government. The use of Government property by the private contractor was at most a non-essential incident of the transaction.

Thus the entire arrangement was initiated by an "order" in regular form placed with a private business concern for a specified "production capacity" (R. 79). The contractor was not required to produce the necessary components, but was authorized to procure both materials and services through regular business channels by purchase or by subcontract (R. 87-88, 130, 134, 136). The contractor purchased required components in its own name, on its own obligation to make payment therefor, and took title initially in its own name (R. 81). Thereafter, title passed to the Government only upon inspection and approval by the Contracting Officer (R. 88, 92, 129). The contractor was required to provide insurance coverage both for damage to property and injury to persons (with specified excepted risks) (R. 93, 145), to hold the Government free from any claim for such damage or injury (R. 150). The contractor was required to pay all taxes, and all water, light, heat and other utility bills (R. 118) and to surrender Government properties used in the same condition as when received, ordinary wear and tear excepted (R. 118). There was a total absence of Governmental supervision of the work other than the usual right of a purchaser to enter to inspect and approve before taking title and making payment. This was expressly reserved in the contract (R. 150).

The contractor was granted the right to use certain Government property, including the real estate used as a measure for the tax here in question. The consideration to the Government was reduction in the price of the product in an amount offsetting rent (R. 92-93). However, the contractor was not required to use the real

estate in its performance under the contract. It could manufacture either in the Government plant or its own plant or in the plants of subcontractors (R. 87-88, 130, 134; 136). On 60 days notice the contractor had the right at any time to terminate the contract with respect to its use of Government facilities, but such termination did not "relieve the contractor of any of its obligations or liabilities under any supply or service contract affected thereby" (R. 149). So long as the contract for the use of Government property was in effect, however, the contractor had exclusive control of it, except as stated above, for the right of access, expressly reserved to the Government, to enter for the purpose of inspection or inventorying or for the purpose of removing government owned facilities in the event of completion or termination of the contract (R. 150).

D. When the Government elects to procure goods and services by purchase in the open market, there is, of course, no ground, constitutional or otherwise, for excluding from the price that portion of the cost attributable to local property taxes. No doubt the major portion of all Government procurement is through purchase in the open market at prices reflecting the burden of local property taxes. Indeed, under the contract in this case it is clear that large portions of the final product bought by the Government were procured by the contractor from regular commercial sources at prices reflecting the taxes of the localities. The contract expressly provides for the payment of such prices. In the present case the Government merely furnished the use of its property (specifically for the purposes of this case the use of its real property) in partial payment for the goods and services which it bought from a private business contractor. It might grant the fee simple in real estate in payment for the products bought or any lesser interest. The principle would be the same whether an interest in real property was provided as part of the purchase price

or whether the entire price was paid in cash. It would not be contended, we suppose, that money paid by the Government for the purchase of goods could be clothed with the sovereign immunity from taxation in the hands of the vendor. Here the vendor was granted the use of the real estate. A tax upon the use is a tax on property received by the vendor as part of the price of goods and services sold.

There is no reason why other property, even real property, given by the Government in payment for goods purchased from a private vendor should be immune from taxation in the hands of the vendor. In either case the only significant results would be those of enhancing the purchasing power of the Federal payment by giving it a tax exempt status, on one side and on the other of correspondingly dissipating the tax dollar of the locality. It is not a governmental function, we submit, protected by sovereign immunity, in effect to raise revenue for the Federal Government in this manner.

The principle enunciated in *McCullough* v. *Maryland*, *supra*, could apply in this case only in reverse. The doctrine as originally announced was designed as a shield of protection against attack upon the sovereign power of the United States. If applied to the facts in the present case it would become a sword of aggression, in effect, to attack the sovereign power of State and local government by restricting their powers of tax collection.

Moreover, viewed in this light, the statute of the State of Michigan is not a subterfuge to accomplish indirectly what could not be accomplished directly, as the appellees argue in their briefs. Rather, we submit the contract in the present case is a subterfuge attempted to be worked by the Department of Defense to accomplish indirectly what it could not do directly. The Department could not purchase goods and services in the open market and make payment in cash without bearing the burden of State

and local taxes that would be reflected in the prices charged. The endeavor in the present case is to achieve that same result through the device of paying for the product purchased in part by the granting of an interest in real property owned by the Government. However laudable the purpose of the Department of Defense to conserve the defense dollar, we believe there is no constitutional protection for the use of this device.

III. CONCLUSION

For the reasons set forth above it is respectfully submitted that no question of sovereign immunity from taxation is really involved in the present case and that the opposition to payment of the tax on any such ground should be overruled.

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